ABO AK PANGKA (F)

v.

MAWER AK KALENG

HIGH COURT, KUCHING
DATUK CHONG SIEW FAI J.
[CIVIL APPEAL NO. KG. 21 OF 1990]
15 MARCH 1993

LAND LAW: Inquiry proceedings before Settlement Officer - Procedures to be followed - Enacting section (s. 94(1)) of Land Code (Cap. 81) silent on procedural aspect - Guidelines by High Court on procedures to be followed in inquiry.

COURTS: Appeal to Sessions Court against order of Settlement Officer - Sessions Court allowing appeal - Whether Court had considered all the evidence before making a decision.

The plaintiff and the defendant laid rival claims to the same piece of land. The Settlement Officer before whom the matter was argued settled the land on the appellant. The respondent being dissatisfied with the decision appealed to the Sessions Court, wherein the learned Judge allowed the appeal and settled the land on the respondent.

The learned Sessions Court Judge made his decision based on the following considerations:

(1) that the settlement proceedings before the Assistant Settlement Officer was with the assistance of three assessors when there was in fact no provision in the Land Code for the appointment of assessors;
(2) that the Advocate for the respondent was prevented from assisting the respondent present his claim and call witnesses;
(3) that the Assistant Settlement Officer had prevented one of the respondent's witnesses' from giving evidence;
(4) that in the settlement hearing there was a failure to consider adequately or at all who had established customary right over the land.

Upon appeal, the Court was requested to provide guidelines on the procedures to be adopted in a hearing before a Settlement Officer in view of the absence of any provision on procedure for an inquiry.

Held:

[1] The learned trial Court Judge had totally failed to consider not only the evidence adduced before the Assistant Settlement Officer, but also the affidavit evidence directed to be filed in the Sessions Court. There has been an absolute failure to consider and evaluate the evidence relating to the merits of the case in coming to the decision of reversing the finding of the Assistant Settlement Officer and in settling the land upon the respondent.

[2] The appellant's claim to the land rested solely on the oral evidence of witnesses given in the settlement proceedings whereas the respondent's claim relied substantially on the affidavit evidence filed in the Sessions Court. In the circumstances it was not appropriate to remit the case to the Sessions Court for a rehearing of the appeal as the Judge would not have the advantage of seeing and observing the witnessess who had given evidence before the Assistant Settlement Officer.

[3] The dispute between the parties should be reverted for fresh investigation under s. 94 of the Land Code to be conducted by the Settlement Officer or his assistant other than the two who had previously dealt with the dispute on the said land.

[4] As the Land Code is silent on the procedure to be followed at the inquiry, the procedure must necessarily be left to the discretion of the Settlement Officer or his assistant assigned to hold the enquiry, subject always to the rules of natural justice.

[5] In exercising the discretion on the procedure to be followed in an inquiry, the Settlement Officer owes a duty to act fairly and honestly and to the best of his ability. The procedure to be adopted must be fair to all those who have an interest in the inquiry whether they are represented or not. What is a fair procedure to be followed will depend upon the nature of the claims, the constitution of the inquiry and of the parties involved and other circumstances of the case.

[Appeal allowed with costs. By consent claims to be investigated afresh under s. 94 of the Land Code].

Cases referred to:

R v. Secretary of State for the Home Department ex parte Santillo [1981] 2 AER 897 CA at 919 ***(refd)***
R v. Hull Prison Board of Visitors [1979] 1 AER 701 @ 713 ***(refd)***
Russell v. Norfolk (Duke) [1949] 1 AER 109 ***(refd)***

Legislation referred to:
Land Code (Cap. 81) s. 93(2), 94(1)

For the appellant - H.H. Cheng; M/s. Cheng & Cheng
For the respondent - John Shek; M/s. John Shek & Co.
For the Director of Lands & Surveys - Abdul Halim, Registrar of Lands & Surveys

JUDGMENT

Chong Siew Fai J:
At the hearing of this appeal, learned Counsel for the respondent frankly conceded and, in my opinion, quite rightly, that he could not support the judgment of the Sessions Court appealed against. Nevertheless, in view of the long history of the matter, I consider it necessary to write a judgment. Moreover, there is the question of costs for determination. I said "long history" because prior to the settlement proceedings constituting the subject matter of this appeal, there had been previous investigations into the claims of the land in this case.

The appellant, Abo (f) ak Pangka, and the respondent, Mawer ak Kaleng in this appeal were respectively the respondent and the appellant in the appeal before the learned Sessions Court Judge against whose decision this appeal is brought. To avoid confusion, I shall call the appellant of this appeal "Abo" and the respondent, "Mawer".

The origin of this appeal may be traced back to the settlement proceedings held between 23 October 1987 and 9 December 1989 at Serian. After the conclusion of the investigation, the Assistant Settlement Officer settled the land on Abo. Mawer, the rival claimant, being unhappy with that decision appealed. The learned Sessions Court Judge, after hearing the appeal, allowed it with costs and held that "the land be settled to the appellant" that is Mawer.

Against the decision of the Sessions Court, Abo appeals to this Court.

In the inquiry proceedings before the Assistant Settlement Officer, six witnesses were called by Mawer including himself, and Abo had three witnesses including herself. After deliberation, the Assistant Settlement Officer and the 3 "assessors" found in favour of Abo.

In his judgment dated 9 December 1987 (appeal record pages 29 - 35), the Assistant Settlement Officer Mr. Rambli bin Osman traced the history of the disputes over the land and gave an account of the evidence of witnesses presented by both sides. He and his "assessors" together with the parties in this appeal also inspected the site of the land. After analysing and assessing the evidence, the Assistant Settlement Officer and the "assessors" came to the conclusion that the right over the land had been established and created by Abo's father before the Japanese Occupation for the purpose of shifting padi cultivation and that the father had given his rights, title, share and interest in the land to Abo. Accordingly they found in favour of Abo.

In the appeal to the Sessions Court, Mawer raised 6 grounds in his petition of appeal (see pages 4 and 5 of the appeal record). At a pretrial hearing, the point was raised on behalf of Mawer on the introduction of further evidence. After considering submissions by Counsel, the learned Sessions Court Judge (who did not hear the actual appeal) allowed both parties to adduce further evidence by way of affidavits. Following that ruling, affidavits were filed in the Sessions Court. Mawer had five; and Abo had one. In the turn of events and for reasons to be given later, it is unnecessary to recapitulate the contents of any of those affidavits save saying that, in contrast to the oral evidence adduced by Abo, the affidavits filed on behalf of Mawer, in the main, seek to establish the claim of Mawer to the land.

In her judgment the learned trial Sessions Court Judge allowed the appeal, overturned the decision of the Assistant Officer and settled the land upon Mawer. She rested her decision on 4 grounds:

1. that the settlement proceedings on 23 October 1987 before the Assistant Settlement Officer were assisted by three assessors but there was no provision in the Land Code for the appointment of assessors to assist the Assistant Settlement Officer;
2. that in contravention of s. 93(2) of the Land Code (Cap. 81), advocate for Mawer was prevented from assisting him to present his claim and calling witnesses;

3. That one Rakun ak Dabak was prevented by the Assistant Settlement Officer from giving evidence; and
4. that in the settlement hearing, there was a failure to consider adequately or at all who had established customary right over the land.

It will at once be noted that in deciding to settle the land upon Mawer, the learned trial Sessions Court Judge had totally failed to consider not only the evidence adduced before the Assistant Settlement Officer, but also the affidavit evidence directed to be filed in the Sessions Court, let alone embarking upon an assessment and analysis of all the relevant evidence or testing any part of them against any of the other. In other words, there has been an absolute failure to consider and evaluate the evidence relating to the merits of the case in coming to the decision of reversing the finding of the Assistant Settlement Officer and in settling the land upon Mawer. Based on the grounds of her judgment as outlined above, the most that the learned trial Sessions Court Judge could have done was to set aside the finding of the Assistant Settlement Officer. For the above reasons, I find myself in agreement with learned Counsel for both parties that the decision of the Sessions Court in settling the land upon Mawer cannot, in any circumstances, be tenable and must accordingly be set aside.

The next matter to consider is whether to remit the case to the Sessions Court for a rehearing of the appeal or to order a fresh settlement proceeding that is a fresh investigation into the claims of the parties to the land. In this respect, having regard to the circumstances of this case, I agree with learned Counsel for both parties that the latter course would be more satisfactory. The issue is essentially one of fact, or possibly, mixed fact and law. Abo's claim to the land rests solely on the oral evidence of witnesses given before the Assistant Settlement Officer **in the settlement proceedings** whereas Mawer's claim relies substantially on the affidavit evidence filed **in the Sessions Court**. A presiding Judge of the Sessions Court would not have the advantage of seeing and observing the witnesses who had given evidence before the Assistant Settlement Officer. Moreover, he has not only to assess and evaluate the affidavit evidence which is largely factual, but also to test and weigh it against the oral testimonies of witnesses who appeared before the settlement proceedings and whom, as I have stated earlier, he has not had the opportunity of seeing and observing. It would be an extremely difficult, if not impossible, task to resolve the disputes in this manner. To my mind, it is totally inappropriate.

For the above reasons, I am in agreement that the dispute between the parties be reverted for fresh investigation under s. 94 of the Land Code to be conducted by the Settlement Officer or his assistant other than the two who had previously dealt with the dispute on the said land.

I am aware that the land had previously twice undergone settlement proceedings under the Land Code and that by the order to be made, further time and expenses of the parties would be involved. However, as indicated by Counsel for both parties to which I am in agreement, this seems to be the fairest and best solution in the circumstances. I can only express my sympathy to the parties concerned, and hope that the settlement authority of the Lands and Surveys would do its best to expedite the settlement proceedings especially considering that the parties are well advanced in age.

I would make an observation here. At page 40 of the appeal record, there appears a passage recorded by the presiding Assistant Settlement Officer of what seemingly had taken place at the inquiry on 23 October 1987. The passage runs:

> ... my assessors and I have pointed out to John Lee that he should not treat this hearing as a judicial Court hearing and he was also advised not to cross-examine the appellant and the respondent and also their witnesses. His presence to this hearing was merely to assist his client in presenting the claim and not to misled the proceedings.

True the proceeding was not a judicial proceeding. It was a public investigation or inquiry. At most it was quasi-judicial. As to the use of the words "not to misled" ("mislead" it should be), they are strong words connoting improper and unethical behaviour of advocates, and were totally uncalled for in the circumstances, there being, on record, not the slightest evidence or indication that Mr. Lee was doing or attempting anything of the sort.

As regards the question of costs of this appeal, the general rule is that a successful appellant gets his or her costs. I see no valid reason to depart from that rule in the instant case. It may substantially be true, as contended by learned Counsel for Mawer, that the appeal succeeds owing to no mistake of the respondent (Mawer). But that, in itself, is insufficient to deprive the appellant from her entitlement to the costs. I have considered the facts and circumstances of this appeal. In my opinion, the appellant ought to be given the costs of the appeal. In the absence of an agreement, such costs may be taxed.

In short,

1. The appeal is allowed and the judgment or order of the Sessions Court delivered on 4 August 1990 is wholly set aside.
2. By consent the claims of the parties herein to the land be investigated afresh under s. 94 of the Land Code (Cap. 81) by the Settlement Officer or his assistant who must be other than the 2 Assistant Settlement Officers who had previously investigated into this land.
3. Costs of this appeal be taxed, if not agreed, and paid by Mawer to Abo.

The above disposes of the appeal before me.

Encik Abdul Halim, the Settlement Officer, however, urged upon me to throw some light on the procedural aspect in view of the absence of any provision on procedure for an inquiry. Section 94(1) of the Land Code (Cap. 81) enacts: "The Settlement Officer shall investigate publicly all claims ..." As the Code is silent on the procedure to be followed at the inquiry, the procedure, within such limits as are necessarily imposed by its qualifying for the description "investigate publicly" as used in the said s. 94(1), must, in my opinion, necessarily be left to the discretion of the Settlement Officer or his assistant assigned to hold the inquiry, subject always to the rules of natural justice. The concept of "natural justice" is based on the following 2 broad principles:

(1) No one should be condemned unheard (*audi alteram partem*). A decision maker must afford an opportunity to be heard to a person whose interests will be adversely affected by his decision (the hearing rule); and

(2) No one should be a judge in his or her own cause (*nemo judex in causa sua*). A decision maker must be disinterested or unbiased in the matter to be decided (the rule against bias).

However, within the above broad principles, the rules of natural justice are said to vary indefinitely. As Lord Denning MR observed in *R v. Secretary of State for the Home Department ex parte Santillo* [1981] 2 AER 897 CA at 919:

> ... the rules of natural justice, or of fairness, are not cut and dried. They vary infinitely.

There can be no doubt that the Settlement Officer or his assistant is obliged to observe natural justice in a settlement inquiry. What, then, are the requirements to be observed by him in order to discharge that obligation? And, what procedural standards are demanded by natural justice? It seems, to me, that there can be no general answer to these questions, except that the procedure adopted must be fair. As Megan LJ observed in *R. v. Hull Prison Board of Visitors* [1979] 1 AER 701 @ 713:

> ... it would be fallacious to assume as appears frequently to be assumed, that the requirements of natural justice in one sphere are necessarily identical in a different sphere.

What will be fair so as to comply with the requirements of natural justice must depend on the circumstances of the particular case. It is, however, essential that the parties concerned must be given a reasonable opportunity to represent their case.

In *Russell v. Norfolk (Duke)* [1949] 1 AER 109 Tucker LJ observed (page 118):

> The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.

In exercising the discretion on the procedure to be followed in an inquiry, the Settlement Officer or his assistant, therefore, owes a duty to act fairly and honestly and to the best of

his ability. The procedure to be adopted must be fair to all those who have an interest in the inquiry whether they are represented or not. What is a fair procedure to be followed will depend upon the nature of the claims, the constitution of the inquiry and of the parties involved and other circumstances of the case.

The above observation is a general one. General, in my view, it has to be on account of the lack of specific point in issue by reason of the order that has been made in this appeal, and also because the rules of natural justice vary infinitely (see *R v. Secretary of State for the Home Department, ex Parte Santillo, supra,* per Lord Denning MR) and the requirements of natural justice depend on the circumstances and the factual situations of each particular case.

CHUAN SENG SDN. BHD.

v.

OOI BOON LAI & 2 ORS.

HIGH COURT, ALOR SETAR
DATO' K.C. VOHRAH J.
[CIVIL SUIT NO. 22-63-87]
18 APRIL 1993

LANDLORD & TENANT: Defendants co-owners of property - Plaintiff in occupation - Plaintiff claiming existence of tenancy - Ground tenants - Defendants disputing claim - Whether there was a tenancy coupled with an equity - Whether plaintiff was a mere licensee.

EVIDENCE: Claim of tenancy coupled with equity - Burden of proof - On whom does it lie - Non-production of material witness - Whether adverse inference to be drawn - Section 114(g) Evidence Act 1950.

The plaintiff company claimed to be the ground tenant of premises co-owned by the three defendants. The defendants disputed the plaintiff's claim on the grounds that the plaintiff was a mere licensee and served a notice to quit requiring delivery up of vacant possession of the land on which the premises stood within one month from the date stated in the notice.

The plaintiff prayed for a declaration that the defendants were not entitled to enter the area of the premises and for an injunction to restrain the defendants and their servants or agents from entering the area of the premises. The plaintiff also claimed damages for trespass.

Held:

[1] It was not disputed that the three defendants are the registered owners of the land which comprises the premises which PW1 and some others occupy. While the plaintiff claims to be a ground tenant, it admits the title of the defendants. It sets up a title derived from the three defendants and the burden of proof was on the plaintiff to show the tenancy.

[2] The evidence shows that only PW1's father and later PW1 herself were the ground tenants of the said premises until 1979 when the land was transferred. It was unlikely that PW1 had paid ground rentals to the transferee on behalf of herself or on behalf of the